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Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

AMERICAN LUNG ASSOCIATION, et al.,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY and Carol M. Browner, Administrator, United States Environmental Protection Agency, Appalachian Power Company, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Are citizen petitioners in the Court of Appeals whose petition for review of a final agency action is granted, and where the agency action is remanded for further proceedings on the ground that the agency failed to satisfy basic standards for reasoned decision making, eligible for an award of attorneys' fees and other costs of litigation under statutory fee shifting provisions such as § 307(f) of the Clean Air Act?

2. Have petitioners who win a judicial decision remanding a final agency action to the agency for further proceedings to remedy a failure to establish a nexus between the facts found and the decision made achieved "some success" qualifying for an award of fees and costs, and not a "purely procedural" victory within the exception for fee awards established by this Court in *Ruckelshaus v. Sierra Club,* 463 U.S. 680, at 688, n.9?

LIST OF PARTIES BELOW

The decision of the Court of Appeals sought to be reviewed is the order denying Petitioners' motion (below) for determination of eligibility for an award of costs of litigation including reasonable attorneys' fees pursuant to § 307(f) of the Clean Air Act, 42 U.S.C. § 7607(f). The only parties participating in that motion were Petitioners (here and below) and the United States Environmental Protection Agency ("EPA"). Industry parties who intervened below as respondents in the proceedings on the merits of EPA's decision were not parties to the fee motion because they are not liable for payment of fees to Petitioners under § 307(f).

Petitioner-parties below are: American Lung Association, Paul J. Walters, Herbert Raymond Woodruff, Environmental Defense Fund, and petitioner-intervenors Carol Ramey on behalf of herself and her asthmatic minor son David Ramey. None of these parties have parent companies or subsidiaries. Respondent below is United States Environmental Protection Agency.

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CITATIONS OF OPINIONS AND ORDERS

The December 31, 1998 order of the Court of Appeals denying Petitioners' eligibility for an award of costs and attorneys' fees is not published. The underlying decision remanding EPA's decision not to revise the National Ambient Air Quality Standards for sulfur oxides is published at 134 F.3d 388, 45 ERC 2025, 328 U.S. App. D.C. 232, 28 Envtl. L. Rep. 20,481.

BASIS FOR JURISDICTION

i. The Court of Appeals' order denying Petiitoners' Motion for Determination of Eligibility for Award of Attorneys' Fees was entered December 31, 1998.

ii. The Court of Appeals denied a timely petition for rehearing on March 3, 1999.

iii. This petition is filed 90 days following denial of rehearing under U.S. Sup. Ct. Rule 13 and 28 U.S.C. § 1254.

GOVERNING STATUTORY PROVISION

Clean Air Act Section 307(f), 42 U.S.C. § 7607(f):

Costs

In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.

STATEMENT OF THE CASE

Summary of Proceedings Below

In the proceedings before the Court of Appeals, the American Lung Association, two of its members with a history of severe asthmatic reactions when exposed to sulfur dioxide emissions in the ambient air, the Environmental Defense Fund and intervenors Carol Ramey on behalf of her severely asthmatic son David ("ALA") petitioned the U.S. Court of Appeals for the District of Columbia Circuit for review of the decision by the United States Environmental Protection Agency ("EPA") not to revise the National Ambient Air Quality Standards ("NAAQS") for sulfur dioxide ("SO2") under § 109 of the Clean Air Act ("CAA").[1] 61 Fed. Reg. 25,566 (1996). ALA argued that EPA had unlawfully failed to satisfy the statutory command in § 109(b)(1) to establish standards that "allow[ ] an adequate margin of safety [and] are requisite to protect the public health", because EPA failed to revise the 1971 NAAQS as required by § 109(d) to prevent 5-minute peak SO2 exposures known to cause adverse health effects documented since the NAAQS was promulgated.

Those effects were acknowledged by EPA in its criteria document required by § 108(a)(2) to be "severe and incapacitating" for half or more of asthmatics exposed to peak concentrations ≥ 0.60 parts per million ("ppm") SO2.

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[1] Decisions by EPA regarding the NAAQS and other regulations of national application under the CAA may only be reviewed within the exclusive jurisdiction of the Court of Appeals for the D.C. Circuit. 42 U.S.C. § 7607(b)(1)

In its final decision, EPA concluded that "repeated occurrences of such effects should be regarded as significant from a public health standpoint." Final Decision at 25,573. EPA also found "the data clearly show that 5-minute peaks greater than 0.60 ppm SO2 can occur around particular industrial point sources of SO2," and "the 5-minute monitoring data indicate that some communities in proximity to SO2 sources are repeatedly subjected to high short-term concentrations of SO2 in the ambient air." 61 Fed. Reg. 25,575. For asthmatics living in areas where the likelihood of frequent exposures is high, EPA "concluded that repeated exposures to 5-minute peak SO2 levels of 0.60 ppm and above could pose a risk of significant health effects for asthmatic individuals." *Id.* 25,573. Despite its finding of significant health risk to individuals, and that frequent occurrence of such effects are significant from a public health standpoint, EPA declined to set NAAQS adequate to prevent these adverse health effects.

In its review of EPA's decision, the Court granted ALA's petition for review and remanded to EPA its decision not to revise the NAAQS for SO2. *ALA v. EPA*, 134 F.3d 388 (1998). The Court based its decision on the Administrator's failure

> to explain the answer she did give, i.e., that SO2 bursts do not amount to a "public health" problem within the meaning of the Act. The link between this conclusion and the factual record as interpreted by EPA – that "repeated" exposure is "significant" and that thousands of asthmatics are exposed more than once per year – is missing. Why is the fact that thousands of asthmatics can be expected to suffer atypical physical

> effects from repeated five-minute bursts of high-level sulfur dioxide not a public health problem? Why are from 180,000 to 395,000 annual "exposure events" . . . so "infrequent" as to warrant no regulatory action? Why are disruptions of ongoing activities, use of medication, and hospitalization not "adverse health effects" for asthmatics? Answers to these questions appear nowhere in the administrative record.

ALA v. EPA, at 392. Citing *Motor Vehicle Mnfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 48 (1983), the Court held the Administrator to the obligation to "cogently explain why [she] has exercised [her] discretion in a given manner." *ALA*, at 392. Given the gaps the Court identified in EPA's reasoning with regard to the "critical task of assessing the public health and the power to make decisions of national import in which individuals' lives and welfare hang in the balance," the Agency failed to meet its "heaviest of obligations to explain and expose every step of its reasoning." *Id.* In view of EPA's failure to provide an explanation that established a nexus between the facts found and the final decision, the Court concluded "we must remand this case to permit the Administrator to explain her conclusions more fully." *Id.* 393.

In addition to relief granted by the Court, ALA obtained further relief by negotiating a Settlement Agreement with EPA in lieu of a petition for rehearing which commits the Agency to conduct proceedings on remand as a notice and comment rulemaking, and to make a final decision no later than 2000. 63 Fed. Reg. 24,782 (May 5, 1998).

After final execution of the Settlement Agreement which expressly preserved ALA's right to apply for attorneys' fees pursuant to § 307(f) of the Act, the government informed ALA that it would oppose any payment of costs of litigation, including reasonable attorney's fees, on the ground ALA was not a prevailing pa.ty. ALA then filed a Motion for Determination of Eligibility for Award of Litigation Costs. The Motion relied upon decisions by this Court holding that a remand of agency action by a court of appeals establishes "prevailing party" status for the victor, and that under § 307(f) of the CAA prevailing party status is not required for an award of attorneys' fees. The Motion also relied on decisions in four other circuits where attorneys' fees had been awarded under similar statutory provisions in cases involving a remand of agency action that did not prescribe specific substantive relief in favor of the citizen parties.

After briefing, the Court denied ALA's motion holding that

> [t]his request for fees is controlled by *Sierra Club v. EPA*, 769 F.2d 796 (D.C. Cir. 1985). As in that case, petitioners here did not meet with "a modicum of success on the merits," because "[t]he agency may be able to justify its position with a simple response containing no reformulation of the challenged portion of the rules. *Id.* at 806.

Order at 2 (December 31, 1998).

Petitioners filed a timely Petition for Rehearing and Suggestion of Rehearing en Banc which was denied on March 3, 1999.

REASONS FOR ALLOWING WRIT

The decision of the Court of Appeals that an award of costs of litigation in this case is not "appropriate" within the meaning of CAA § 307(f) should be reviewed by this Court to resolve conflicts with prior decisions of this Court and conflicts with at least four other United States courts of appeals that have addressed the same question. In addition to resolving conflicts, the decision should be reviewed because of the extraordinarily important role the D.C. Circuit Court of Appeals plays in the supervision of agency implementation of the nation's environmental protection programs.

The decision of the D.C. Circuit court of appeals that Petitioners are not eligible for fees and costs in cases where the petition for review is granted but a remand is the primary relief, is especially important in cases such as this which involve review of agency decisions that implement the broad, guiding policies of the environmental statutes. In these cases, the reviewing court is usually constrained by its supervisory role not to prescribe the policies for statutory implementation, and instead must limit its intervention to ensuring that agencies perform reasoned decision-making. Under these constraints, the Court will often limit relief to remanding an agency decision for further consideration. This is especially true in cases such as this where the citizen challenge is to agency inaction. When courts review agency decisions not to act, there is no action to be vacated or reversed. The decision at issue here begins to define a class of cases in which challengers to agency inaction may win all there is to win, but still not qualify for an award of fees and costs.

Given its role as the only court in the nation with jurisdiction to review EPA final actions "of nationwide scope or effect" under § 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), the rule adopted in this case will significantly limit the reliance that adversely affected segments of the public may place on the fee-shifting provision that plays a major role in ensuring that agency decisions not to implement congressional policies are subject to effective judicial review. As a practical matter, the Court's decision in this case could strip the Act of its fee-shifting provision for a significant class of cases that involve the most important decisions governing the implementation and administration of the CAA.

Proceedings to review most, if not all, of the major decisions by EPA to implement the CAA – decisions such as review and promulgation of national ambient air quality standards under § 109(b), national emission standards for hazardous air pollutants under § 112(d), new source performance standards under § 111(a), emission standards for autos, trucks, buses, railroad locomotives and air plane engines under Title II, regulations governing implementation of the national acid rain program under Title IV, and criteria and procedures governing the air quality review and approval of metropolitan transportation plans and programs under § 176(c) – will be governed exclusively by the fee eligibility rule adopted by the D.C. Circuit unless that rule is modified by this Court.

Had petitioners anticipated the D.C. Circuit's rule, it would likely have precluded the commencement of this case. ALA has no staff counsel employed to pursue these kinds of cases. ALA and the individual petitioners, as well as EDF, relied in this case upon counsel with 25

years of experience in Clean Air Act litigation who was willing to pursue this matter on a contingency fee arrangement. Counsel was willing to invest many months effort in this case because of the expectation of a fee award in the event some success were obtained. If the D.C. Circuit rule is allowed to govern future cases, many such cases will not be brought and the congressional purpose of allowing fees "whenever . . . appropriate will be defeated.

1. DENIAL OF FEES UNDERMINES CONGRESS' PURPOSE IN AUTHORIZING FEES.

The denial of attorneys' fees and costs of litigation in cases such as this would defeat the policy choice Congress made in adding authority for courts of appeals to award fees "whenever . . . appropriate."[2] Congress explained its intent to authorize fees in agency review cases "to encourage litigation which will assure proper implementation and administration of the act or otherwise serve the public interest. The committee did not intend that the court's discretion to award fees under this provision should be restricted to cases in which the party seeking fees was the 'prevailing party'." H.R. Rep. 294,

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[2] A number of fee-shifting provisions of federal statutes authorize awards of attorneys' fees in terms identical to § 307(f). *See Ruckelshaus v. Sierra Club*, 463 U.S. 680, 682, n. 1 (1983). Some of these parallel fee provisions also apply to statutes which, similar to the CAA, grant exclusive jurisdiction for the review of EPA actions to the D.C. Circuit court of appeals. *See*, e.g., the Resource Conservation and Recovery Act, 42 U.S.C. § 6976(a)(1); Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9613(a).

95th Cong., 1st Sess. 337 (1977), U.S. Code Cong. & Ad. News 1416 (1977).

Here petitioners obtained a remand of EPA's decision not to adopt national ambient air quality standards that would protect asthmatics from bursts of SO2 that cause health effects EPA described as "severe and incapacitating." The Court based its decision on the Administrator's failure to explain the link between her conclusion "that SO2 bursts do not amount to a 'public health' problem within the meaning of the Act" and her findings "that 'repeated' exposure is 'significant' and that thousands of asthmatics are exposed more than once a year. . . . " *ALA*, 392. By failing to explain why "the fact that thousands of asthmatics can be expected to suffer atypical physical effects from repeated five-minute bursts of high-level sulfur dioxide [is] not a public health problem," the Court concluded that "the Administrator cannot fulfill her responsibility under the Clean Air Act to establish NAAQS 'requisite to protect the public health. . . . ' " *Id.*

ALA won from the Court an order requiring EPA on remand to carry out its "critical task of assessing the public health and [exercising] the power to make decisions of national import in which individuals' lives and welfare hang in the balance" by meeting its "heaviest of obligations to explain and expose every step of its reasoning." *Id.* By achieving this result, ALA fulfilled the purpose Congress intended to "encourage" by enacting authority to award fees, i.e., "litigation which will assure proper implementation and administration of the act or otherwise serve the public interest." H.R. Rep., *supra*. The litany of critical questions recited by the Court of Appeals that EPA left unanswered in this rulemaking is the best

evidence that the Act has not been properly administered and that the public health protection goals of the Act have not been properly implemented. Denying fees to parties who shoulder the burden Congress invited them to undertake, and who thereby achieve a remand requiring EPA to properly perform its critical decision-making task, defeats the purpose underlying section 307(f) and its counterpart in many other federal statutes. Since ALA has served the public interest by ensuring that EPA will faithfully carry out its obligations to properly implement the Act, it has satisfied the criteria identified by Congress for an award of fees and litigation costs.

2. CONFLICTS WITH DECISIONS OF THE SUPREME COURT.

The decision to deny fees in this case is in conflict with two decisions of the Supreme Court: 1) *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 688 (1983), where the Court concluded that "[s]ection 307(f) was meant to expand the class of parties eligible for fee awards from prevailing parties to partially prevailing parties – parties achieving some success, even if not major success"; and 2) *Shalala v. Schaefer*, 509 U.S. 292, 301 (1993), where the Court held that a party who obtains a court order remanding an agency decision, even though the order does not require the agency to reach a particular result on remand, "is a prevailing party" and therefore qualifies for an award of attorneys' fees under a statute that requires prevailing party status as a predicate for an award of fees. Since this Supreme Court precedent establishes that winning a remand qualifies ALA as a prevailing party, *a fortiori*, fees

should be awarded under the less demanding "whenever . . . appropriate" test of § 307(f).

Fundamentally, the Court of Appeals' decision is at odds with, and fails to consider, the Supreme Court's decision in *Shalala*, that a judicial remand of an agency decision qualifies the petitioner as a "prevailing party." *Id.* There the Court clarified potentially conflicting precedents and held that a party who obtains an order remanding an agency decision "is a prevailing party." *Id.* 301. In *Shalala*, the Court rejected the argument that

> a Social Security claimant does not 'prevail' until he is awarded Social Security benefits. The premise of this argument is wrong. No holding of this Court has ever denied prevailing party status (under [EAJA]) to a plaintiff who won a remand order pursuant to sentence four of § 405(g).

Id. at 300. The Court expressly rejected dicta in *Sullivan v. Hudson*, 490 U.S. 877 (1989) "that remand does not generally confer prevailing party status. . . . " *Id.* 301. The Court explained that *Hudson* "simply failed to recognize the distinction between a sentence-four remand, which terminates the litigation with victory for the plaintiff, and a sentence-six remand, which does not." *Id.* at 301. The distinction missed in *Hudson* is that sentence six of 42 U.S.C. § 405(g) applies only to a " 'narrow class of qualifying administrative proceedings' where 'the district court retains jurisdiction of the civil action' pending the completion of the administrative proceedings." *Id.* In contrast, sentence-four applies where the court enters a final judgment "without retention of jurisdiction," with or without remand to the agency. 509 U.S. at 297, 299.

In *ALA*, the Court of Appeals' order "remand[ed] this case to the agency for further proceedings consistent with this opinion." *ALA*, at 393. "If the case is remanded, this court does not retain jurisdiction. . . . " D.C. Circuit Rule 41(b). Thus the Court's decision on the merits, as does a sentence-four order in a Social Security case, " 'terminate[ed] the civil action' seeking judicial review of the [agency's] final decision." 509 U.S. at 299. Accordingly, the final order with remand to EPA also "terminates the litigation with victory for the plaintiff." *Shalala* at 301. Applying *Shalala* here, Petitioners are prevailing parties.

The Court's holding in *Shalala* relied substantially on *Texas State Teachers Assn. v. Garland Independent School District*, 489 U.S. 782 (1989) which held "that [prevailing party] status [is] obtained 'if the plaintiff has succeeded on any significant issue in litigation which achieve[d] some of the benefit . . . sought in bringing suit.' *Id.* at 791-792. . . . " Here, ALA succeeded in winning a decision from the Court that rejected EPA's decision as not meeting the basic tests for reasoned decision-making. As a result, ALA achieved some of the benefit sought in bringing suit by preventing prejudice to the health protection interests of asthmatics that would have occurred had EPA's decision become settled agency precedent. Requiring EPA to undertake further proceedings it would not otherwise have been required to conduct to determine whether asthmatics qualify for protection from short bursts of SO2 under the CAA clearly promotes the interests ALA sought to protect. In addition, based on this ruling, ALA obtained further relief from EPA in a Settlement Agreement which provides for notice and comment rulemaking procedures and a schedule ensuring a final

decision no later than December 2000. 63 Fed. Reg. 24,782 (May 5, 1998).

The Court of Appeals offered no rationale for not applying *Shalala* and *Garland* under the facts of this case.

The Court of Appeals' decision also effectively reverses this Court's decision in *Ruckelshaus* by denying fees even when a petitioner achieves some of the relief sought in bringing suit. This Court determined that Congress' use of "whenever . . . appropriate" as the test for an award of fees was "intended to eliminate both the restrictive readings of 'prevailing party' adopted in some of the cases cited above and the necessity for case-by-case scrutiny by federal courts into whether plaintiffs prevailed 'essentially' on 'central issues.' " 463 U.S. at 688. "[P]arties achieving some success, even if not major success" are eligible for a fee award under *Ruckelshaus*.

Cases rejected by this Court as requiring a too stringent "prevailing party" test for purposes of § 307(f) would have awarded fees to litigants who on one theory or "central issue" of the suit challenged EPA's decision as not based on rational decision-making. The test applied by the Court of Appeals, however, would go well beyond the cases the Supreme Court saw as too restrictive under § 307(f) by measuring success in terms of speculation about the agency's hypothetical response on remand rather than success based on what petitioners sought to achieve by bringing suit, or by the relief obtained. The test applied to ALA would bar fees for a claim that would have satisfied traditional prevailing party tests and is clearly not consistent with Congress' intent to lower the

fee threshold for litigation that promotes the "proper implementation and administration of the Act."

The Court of Appeals' reliance on its prior decision in *Sierra Club v. EPA*, 769 F.2d 796 (D.C. Cir. 1985), as controlling, rather than on the precedents of this Court in *Shalala* and *Ruckelshaus*, is the root of the error in this case. The panel's decision inappropriately relies on the single rule provision remanded to EPA in *Sierra Club* for which fees were denied rather than relying on the five rule provisions remanded to EPA in that case for which fees were granted. In *Sierra Club*, fees were denied only for one of the remanded rule provisions because, as to that one issue, EPA had not offered any rationale for its position in response to public comments. The *Sierra Club* court identified the key factor that distinguished that claim from the five other claims resulting in remands for which fees were "appropriate," i.e., that the "current situation falls into the category of a 'purely procedural' victory, since we have not found wanting any action of the agency but merely instructed the agency to provide us with its rationale." *Id.* at 806. The Court reviewed and rejected the Sierra Club's primary objection to that rule provision on the merits. The only basis for remand was that the Court could not review one aspect of the rule provision in the absence of a response to the issue from EPA during the rulemaking. Accordingly, it held that a remand for the sole purpose of obtaining EPA's initial response to the issue was "purely procedural" within the exception established by this Court in *Ruckelshaus*, 463 U.S. at 688, n.9. *Sierra Club*, 769 F.2d at 806.

The situation in *Sierra Club* is in marked contrast to EPA's SO2 decision where EPA fully responded to ALA's

rulemaking comments and the Court reviewed the agency's decision on the merits of the rationale offered by EPA. The Court clearly found it could not sustain EPA's decision because the Administrator failed to establish a logical connection between her finding of health effects caused by SO2 bursts, i.e., that " 'repeated occurrences of such effects should be regarded as significant from a public health standpoint'," *ALA*, 391, and her final decision not to issue NAAQS that protect against such health effects. "The link between this conclusion and the factual record as interpreted by EPA – that 'repeated' exposure is 'significant' and that thousands of asthmatics are exposed more than once a year – is missing." *ALA*, 392. Citing *Vermont Yankee Nuclear Power Corp. v. N.R.D.C.*, 435 U.S. 519 (1978), *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), and *Motor Vehicle Mnfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29 (1983), the Court concluded that "[w]ithout answers to these questions, the Administrator cannot fulfill her responsibility under the Clean Air Act to establish NAAQS 'requisite to protect the public health,' 42 U.S.C. § 7409(b)(1), nor can we review her decision." *ALA*, 392.

The Court rejected EPA's Final Decision on the substantive conclusions offered by EPA, not on a mere procedural omission grounded in agency silence. The Court found EPA's decision deficient under the most basic test of agency decision-making, i.e., the failure to "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' " *Motor Vehicle Mnfrs.*, at 43, citing *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962). Where "the agency has failed to offer the rational connection between facts and judgment," its decision fails to

"pass muster under the arbitrary and capricious standard." *Motor Vehicle Mnfrs.*, at 56. Indeed, as the Court of Appeals recently held, a judicial ruling that an agency has committed a "clear error of judgment," which necessarily includes a decision for which the agency failed to offer an adequate explanation, is "substantive," and not purely procedural. *James Madison Ltd., by Hecht v. Ludwig*, 82 F.3d 1085, 1098 (D.C. Cir. 1996).

Rejecting EPA's decision on the grounds identified in *Motor Vehicle Mnfrs.*, as the Court did, is clearly a decision on grounds this Court has characterized as arbitrary and capricious. The CAA treats arbitrary and capricious Agency actions as substantive grounds for relief under § 307(d)(9)(A), compared with procedural flaws in Agency decisions under § 307(d)(9)(D) that may only be remedied by a reviewing Court if "there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made." § 307(d)(8). To the extent Congress treats the kind of flaw that invalidated EPA's SO2 decision as substantive under the Act, it should not be treated as a "purely procedural" victory for purposes of construing the scope of this Court's exception for an award of costs and fees under § 307(f). *Ruckelshaus*, 688, n.9.

Petitioners' success in winning an order rejecting EPA's Final Decision on this ground represents "some success" which is all this Court requires for eligibility under § 307(f). The fact that the Court of Appeals in *ALA* declined to reach a number of ther merits arguments raised by ALA, and granted only a portion of the relief

requested, is also not a bar to fees under the "whenever . . . appropriate" test. *See Conservation Law Foundation of New England v. Secretary of Interior*, 790 F.2d 965 (1st Cir. 1986) where the Court granted fees in a case mooted by the Interior Department's failure to receive any bids for the offered OCS oil leases after a preliminary injunction issued but before a determination on the merits in " '[S]ome success, even if not major success,' may be taken as notable progress, short of full achievement, on any issue of substance." *Id.* at 967. Where Petitioners achieved part of the purpose for bringing suit, to wit, a remand that requires EPA to reconsider the public health consequences of its initial decision not to extend protection to asthmatics under the Act, and promoted proper implementation of the Act, they should be eligible for fees and costs under both *Ruckelshaus* and *Garland*.

Furthermore, a remand on the substance of EPA's decision – or indeed, even on procedural grounds – is all that is required for an award of fees under *Shalala*, supra.

The implication of the Court of Appeals' denial of fees is that the successful remand of agency action that is arbitrary and capricious because it fails to explain the basis for the choice made – perhaps the most basic requirement of administrative law – can never qualify for an award of attorneys' fees under the CAA. While this view may have provided the rationale for D.C. Circuit holdings in cases governed by statutes requiring prevailing party status for an award of fees, e.g., *Waterman Steamship Corp. v. Maritime Subsidy Board*, 901 F.2d 1119 (D.C. Cir. 1990) and *National Coalition Against Misuse of Pesticides v. Thomas*, 815 F.2d 1579 (D.C. Cir. 1987), this rationale has not been adopted by this Court or other

circuit courts in cases under statutes authorizing fees "whenever . . . appropriate."[3] On the contrary, judicial determinations that agencies have failed to properly perform their responsibility for reasoned decision-making have provided a recognized ground for awards of attorneys' fees under such statutes.

Even under statutes requiring "prevailing party" status for an award of fees, at least one court of appeals has now applied this Court's decision in *Shalala* as requiring an award of fees in remand cases. This Court's re-analysis of prior "prevailing party" cases in *Shalala* convinced the Ninth Circuit that it should reconsider its prior holdings that a remand without granting some additional "benefit" to petitioners fails to establish "prevailing party" status. The Ninth Circuit recently held that *Shalala v. Schaefer* required it to reverse prior holdings that fees are not available to parties who win remands without more. *Rueda-Menicucci v. Immigration and Naturalization Service*, 132 F.3d 493, 495 (9th Cir. 1997):

> Although *Schaefer* was a Social Security case, we can perceive no difference between a "sentence four" remand under § 405(g) and a remand to BIA for further proceedings. In both cases, the remand terminates judicial proceedings and results in the entry of a final judgment. We conclude that *Schaefer* effectively overrules our holdings in *Escobar Ruiz* and *Beltran-Zavala* that the entry of judgment remanding a case to the

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[3] Even as to "prevailing party" fee-shifting provisions, the rationale enunciated in *Waterman Steamship* and *National Coalition* has been superseded by *Shalala*.

> BIA for further consideration does not constitute a final judgment in favor of the petitioner. Because petitioners obtained such a remand, they are prevailing parties under *Schaefer* and, thus, entitled to attorney's fees. . . .

In addition to being in conflict with this Court's teaching in *Shalala v. Schaefer,* the D.C. Circuit's denial of fees to ALA also creates a clear conflict between the circuits with regard to the application of this Court's teaching in *Shalala.*

3. CONFLICTS WITH DECISIONS OF THE COURTS OF APPEALS.

The decision is also in conflict with decisions of other United States courts of appeals where fees were awarded under "whenever . . . appropriate" statutes notwithstanding that the result in the judicial proceedings did not preclude adoption of the same agency position after further administrative proceedings:

1. In *National Wildlife Federation v. Hanson,* 859 F.2d 313 (4th Cir. 1988), where the court of appeals rejected the government's objections to an award of fees for judicial proceedings resulting in remand of a wetlands determination to the Army Corps of Engineers without any determination by the court that the land was a wetland ("What is at issue here is whether the Corps has properly performed its duty to make a reasoned wetland determination. . . . Whether or not the Corps and EPA ultimately determine that tract 1 is wetlands, the NWF will

still have served a key purpose of the citizen suit provision which is to ensure that the agencies fulfill their duties under the CWA responsibly.") *Id.* at 317.

2. *Chemical Manufacturers Association v. U.S. EPA*, 885 F.2d 1276, 1279 (5th Cir. 1989), where fees were awarded over the government's objections after remand of an EPA rule establishing technology standards under the Clean Water Act for reconsideration by the agency of its subcategorization scheme following notice and comment proceedings ("NRDC thus advanced the goal of reducing pollution, one central to the CWA, by obtaining an order that the EPA's subcategorization scheme be reviewed for possible modification after adequate notice and comment. . . . "), *id.*, and a remand of new source performance standards for failure to consider recycling as "demonstrated technology" ("success on this contention advances the goals of the CWA by requiring the EPA to consider technology that might have allowed it to promulgate lower NSPS."). *Id.*

3. *Ober v. U.S. Environmental Protection Agency*, 84 F.3d 304 (9th Cir. 1996), where fees were awarded for the remand of EPA's approval under the Clean Air Act of the Arizona implementation plan because "[p]etitioners were prejudiced when they did not have notice of or an opportunity to comment on the post-comment period justifications which were submitted by the State and were critical to the EPA's approval decision." The Court "remand[ed] to the EPA to provide an opportunity for public comment on the justifications [for the omission of potentially available emission control measures] submitted by the State [after the close of the public comment period]." *Id.* at 315, 316 (fees awarded).

4. *Sierra Club v. EPA*, 769 F.2d 796 (D.C. Cir. 1985), where the Court granted fee awards for remands of at least two challenged provisions of EPA's tall stacks regulations regarding which the Court did not prescribe relief other than requiring EPA to address questions not adequately addressed in the initial rulemaking.

With the sole exception of this case, courts of appeals in both the D.C. Circuit and three other circuits have awarded or authorized the award of fees under "whenever . . . appropriate" statutes in cases where agency failure to consider issues or properly explain the basis for its decision resulted in a remand for further agency proceedings. One of the issues remanded by the D.C. Circuit in *Sierra Club*, 719 F.2d 436, was sent back to EPA because the agency made conflicting assumptions regarding the need for plume downwash demonstrations in different parts of the rule. The Court found it necessary to reject "[s]uch inconsistency [a]s the hallmark of arbitrary action." *Id.* at 459. Fees were awarded for success in showing that agency action to be arbitrary despite the fact that the Court did not order EPA to adopt one of the rationales or preclude the Agency from re-adopting the remanded rules. *Sierra Club*, 769 F.2d at 805.

Similarly, in *Ober v. U.S. EPA*, 84 F.3d 304 (9th Cir. 1996), fees were granted under § 307(f) where the Court found EPA's approval of the Arizona State Implementation Plan to be arbitrary and capricious or an abuse of discretion because EPA relied for its decision on justifications submitted by Arizona after the close of public comments. Nothing in the decision barred EPA from once again approving the Arizona implementation plan after providing an opportunity for public comment.

Fees were also granted in *National Wildlife Federation v. Hanson*, 859 F.2d 313 (4th Cir. 1988), where the Court remanded a wetlands decision to the Army Corps of Engineers as arbitrary and capricious for failure to make a proper wetlands determination. Again, nothing in the Court's decision barred the Corps from renewing the challenged wetlands determination after conducting a proper site investigation.

In *Chemical Manufacturers Association v. U.S. EPA*, 885 F.2d 1276 (5th Cir. 1989), EPA technology standards for a class of water pollution sources was remanded for failure to provide notice of EPA's consideration of subcategories of sources adopted as part of its final rule, and because EPA's failure to consider recycling as a demonstrated technology was found to be arbitrary and capricious. But neither of these grounds for remand foreclosed the possibility that EPA might adopt the same source categorization scheme or prescribe the same technology standards after providing notice and an opportunity for comment.

In each of these cases, the remand was predicated on EPA's failure to adequately consider relevant factors, give proper notice or adequately explain the result it reached. None of these decisions precluded the agency from adopting its initially challenged position after proceedings on remand, but they did reverse the agency's initial decision based on flaws that violated basic requirements of reasoned decision-making. Since virtually all the other courts of appeal that have ordered remands of agency actions on these grounds have also awarded fees to the parties who won those remands, those precedents create a conflict among the circuits that should serve as a basis for allowing a writ in this case.

4. SHOWINGS REQUIRED FOR FEE APPLICATION OPEN A PANDORA'S BOX.

Denying fees because an agency may be able to "justify its position with a simple response containing no reformulation of the challenged portion of the rules" opens a Pandora's box by requiring the reviewing court to speculate about the likely outcome of agency proceedings on remand, and possibly the outcome of any later judicial review of the action taken on remand. This case demonstrates the potential implications of such a rule, especially given the array of hurdles EPA must cross in order to lawfully justify re-adopting the position challenged in this litigation, and given the Court's express decision not to address most of petitioners' legal arguments on the merits.

In response to EPA's Advance Notice of Proposed Rulemaking, announcing its proceeding on remand, for example, ALA has submitted a long list of reasons why EPA is precluded from simply re-adopting its initial position, including *inter alia*, 1) the impossibility of satisfying the requirement of the Court's remand order that EPA reconcile its factual findings that the health effects caused by SO2 bursts "should be regarded as significant from a public health standpoint" with its legal conclusion that these effects warrant no regulatory action without changing one or the other of these positions; 2) the exposure analysis on which EPA relied for its decision in 1996 is outdated and unreliable for many reasons and further reliance on it would be arbitrary and capricious; 3) the effects of SO2 on asthmatics are so similar to the effects of ozone that it would be unreasonable for EPA to rely on

those effects to revise the ozone NAAQS as it did in 1997 but not rely on them to revise the SO2 NAAQS; 4) ALA's many legal arguments that the Court declined to address (e.g., *inter alia*, "whether the Clean Air Act authorizes the Administrator to decline to protect an identifiable group of asthmatics," *ALA*, 393), and 5) even if EPA determines that the health effects of exposure to SO2 bursts are not "adverse" for the purpose of setting primary NAAQS under § 109(b)(1), such effects nonetheless trigger EPA's duty to set welfare standards adequate to protect against adverse effects on "personal comfort and well-being" under §§ 109(b)(2) and 302(h). Clearly, in the face of these issues EPA cannot simply "justify its position with a simple response."

For the Court to decide whether EPA would ultimately be able to lawfully reach the same result it reached in 1996, it must engage in an inquiry into the effect of these issues on EPA's options that goes far beyond the speculative hypothesis that appears to underlie the denial of ALA's motion for fee eligibility. The Court of Appeals cannot determine what the range of permissible answers to these questions might be on the 1996 agency record. Without a new record, the Court can only speculate about the final result of agency action. And absent a new decision from the agency, the Court's analysis would necessarily prejudge the agency outcome in ways that could unfairly influence the agency's decision, possibly to the prejudice of interest groups who were not party to the litigation pending before the Court.

In addition to the Pandora's box these issues open both for the Court and fee applicants, the inquiry the Court's decision invites has no basis in any of the criteria

Congress, this Court or other courts have identified as the basis for an award of fees under § 307(f).

CONCLUSION

A writ should be allowed in this case to bring the D.C. Circuit's rule governing eligibility for an award of attorneys' fees under "whenever . . . appropriate" fee-shifting statutes in line with the controlling precedent of this Court, to resolve the conflict with the other United States courts of appeals that have allowed awards of fees and costs under the Clean Air Act and other "whenever . . . appropriate" statutes in similar remand cases, and to remove the conflict with one other circuit regarding the application of this Court's criteria for determining "prevailing party" status in remand cases under *Shalala*.

A writ to correct the practice of the D.C. Circuit is especially appropriate given that Court's exclusive jurisdiction over most, if not all, of the major policy decisions EPA will make to implement the Clean Air Act, the Resource Conservation and Recovery Act, and C.E.R.C.L.A. as well as the disproportionately large number of agency review actions brought in that Court. If the congressional policy of authorizing awards of fees and costs as a means of promoting litigation that contributes to the effective implementation and administration of these laws is to be given effect, it must be carried out

by the D.C. Circuit in a manner consistent with the teachings of this Court in *Ruckelshaus* and *Shalala*. A writ is necessary to ensure that result.

Respectfully submitted,

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United States Court of Appeals
For The District of Columbia Circuit

No. 96-1251

September Term, 1998

American Lung Association, et al.,

Petitioners

v.

Environmental Protection Agency and Carol M. Browner, Administrator, United States Environmental Protection Agency,

Respondents

Appalachian Power Company, et al.,

Intervenors

Consolidated with 96-1255

BEFORE: Edwards, Chief Judge, Ginsburg and Tatel, Circuit Judges

ORDER

(Filed March 3, 1999)

Upon consideration of petitioners' petition for rehearing filed February 16, 1999, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

United States Court of Appeals

For The District of Columbia Circuit

Nos. 96-1251 & 96-1255 **September Term, 1998**

American Lung Association, et al.,

Petitioners

v.

Environmental Protection Agency
and Carol M. Browner, Administrator,
United States Environmental
Protection Agency,

Respondents,

Appalachian Power Company, et al.,

Intervenors.

Before: Edwards, Chief Judge, Ginsburg and Tatel, *Circuit Judges.*

ORDER

(Filed Dec. 31, 1998)

This matter came before the court upon the application of Petitioners American Lung Association, Paul J. Walters, Herbert Raymond Woodruff, and Environmental Defense Fund for reimbursement of attorneys' fees pursuant to 307(f) of the Clean Air Act, 42 U.S.C. § 7607(1) (1994), for expenses incurred during their preparation for *American Lung Assoc. v. EPA*, 134 F.3d 388 (D.C. Cir. 1998). In that case, we had before us petitioners' challenge to

the primary national ambient air quality standards for sulfur dioxide. We remanded to the Agency for a more complete explanation why it concluded that the substantial physical effects experienced by some asthmatics from exposure to short-term, high-level sulfur dioxide bursts do not amount to a public health problem.

This request for fees is controlled by *Sierra Club v. EPA*, 769 F.2d 796 (D.C. Cir. 1985). As in that case, petitioners here did not meet with "a modicum of success on the merits." *Id.*, at 800, because "[t]he agency may be able to justify its position with a simple response containing no reformation of the challenged portion of the rules." *Id.*, at 806. It is therefore

ORDERED and **ADJUDGED** that the petition for attorneys fees be denied.

Per curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Linda Jones
Deputy Clerk

AMERICAN LUNG ASSOCIATION, et al.,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY
and Carol M. Browner, Administrator,
United States Environmental
Protection Agency,
Respondents,
Appalachian Power Company, et al.,
Intervenors.

Nos. 96-1251 & 96-1255,

United States Court of Appeals,
District of Columbia Circuit.

Argued Sept. 26, 1997.

Decided Jan. 30, 1998.

On Petitions for Review of an Order of the Environmental Protection Agency.

Robert E. Yuhnke argued the cause for petitioners. With him on the briefs were Christine L. Shaver, Boulder, CO and Howard I. Fox, Washington, DC.

Karen L. Egbert, Attorney, U.S. Department of Justice, Washington, DC, argued the cause for respondents. With her on the brief were Lois J. Schiffer, Assistant Attorney General, and Michael L. Goo, Counsel, Environmental Protection Agency, Washington, DC. Gerald K. Gleason, Counsel, entered an appearance.

Andrea Bear Field, Henry V. Nickel, Linda C. Trees, and James R. Bieke, Washington, DC, were on the brief for intervenor Appalachian Power Company, et al. Ross S. Antonson, Washington, DC, entered an appearance.

Before: EDWARDS, Chief Judge, GINSBURG and TATEL, Circuit Judges.

Opinion for the Court filed by Circuit Judge TATEL.

TATEL, Circuit Judge:

On behalf of the nation's nearly nine million asthmatics, the American Lung Association and the Environmental Defense Fund challenge the Environmental Protection Agency's refusal to revise the primary national ambient air quality standards for sulfur dioxide (SO sub2). Declining to promulgate a more stringent national standard, the EPA Administrator concluded that the substantial physical effects experienced by some asthmatics from exposure to short-term, high-level SO sub2 bursts do not amount to a public health problem. Because the Administrator failed adequately to explain this conclusion, we remand for further elucidation.

I

Driven by its "deep concern for protection of the health of the American people," SEN. REP. NO. 91-1196, at 1 (1970) ("SENATE REPORT"), Congress enacted the Clean Air Act Amendments of 1970, Pub.L. No. 91-604, 84 Stat. 1676 (1970) (codified as amended at 42 U.S.C. §§ 7401-7671q (1994)), mandating a "massive attack on air pollution," Senate Report at 1. As amended, the Clean Air Act erects a comprehensive system of national ambient air quality standards ("NAAQS") to regulate health-threatening air pollutants. The statute defines primary NAAQS as "ambient air quality standards the attainment

and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health." 42 U.S.C. § 7409(b)(1).

Once the EPA Administrator concludes that a pollutant "may reasonably be anticipated to endanger public health or welfare" and that it comes from "numerous or diverse mobile or stationary sources," *id.* § 7408(a)(1)(A)-(B), the Act requires the Administrator to produce "criteria," defined as the latest scientific data on "all identifiable effects on public health" caused by that pollutant. *Id.* § 7408(a)(2). Based on these comprehensive criteria and taking account of the "preventative" and "precautionary" nature of the act, *Lead Industries Ass'n, Inc. v. EPA*, 647 F.2d 1130, 1155 (D.C.Cir.1980), the Administrator must then decide what margin of safety will protect the public health from the pollutant's adverse effects – not just known adverse effects, but those of scientific uncertainty or that "research has not yet uncovered." *Id.* at 1153. Then, and without reference to cost or technological feasibility, the Administrator must promulgate national standards that limit emissions sufficiently to establish that margin of safety. *See* 42 U.S.C. § 7409(b)(1); *American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1181-82 (D.C.Cir.1981) (describing NAAQS promulgation procedure); *Lead Industries*, 647 F.2d at 1148-50 (in establishing NAAQS, Congress deliberately subordinated economic and technological feasibility concerns to the achievement of public health goals). States bear primary responsibility for attaining, maintaining, and enforcing these standards. *See* 42 U.S.C. § 7410.

In its effort to reduce air pollution, Congress defined public health broadly. NAAQS must protect not only average healthy individuals, but also "sensitive citizens" – children, for example, or people with asthma, emphysema, or other conditions rendering them particularly vulnerable to air pollution. SENATE REPORT at 10; *Lead Industries*, 647 F.2d at 1152. If a pollutant adversely affects the health of these sensitive individuals, EPA must strengthen the entire national standard. *Lead Industries*, 647 F.2d at 1153 (NAAQS "must be set at a level at which there is 'an absence of adverse effect' on [ ] sensitive individuals") (quoting SENATE REPORT at 10).

Sulfur Dioxide and Asthmatics

A highly reactive colorless gas smelling like rotten eggs, sulfur dioxide derives primarily from fossil fuel combustion. Best known for causing "acid rain," at elevated concentrations in the ambient air, SO sub2 also directly impairs human health. As the Administrator explains in the Final Decision on review here, SO sub2 can affect healthy nonasthmatic individuals at concentrations above 2.0 parts per million ("ppm"); below 2.0 ppm, it primarily affects people with asthma. National Ambient Air Quality Standards for Sulfur Oxides (Sulfur Dioxide) – Final Decision, 61 Fed.Reg. 25,566, 25,570 (1996).

Following the passage of the Clean Air Act, EPA promulgated the SO sub2 NAAQS in effect today. The primary standards consist of a 24-hour standard (0.14 ppm averaged over 24 hours not to be exceeded more than once a year) and an annual standard (0.03 ppm

annual arithmetic mean). *Id.* at 25,568. EPA also established a "secondary" three-hour standard (0.50 ppm averaged over three hours not to be exceeded more than once a year), designed to protect the "public welfare" against non-health-related effects such as visibility impairment or environmental degradation, *see* 42 U.S.C. § 7409(b)(2). Petitioners do not challenge these existing standards.

Approximately four percent of the nation's population suffers from asthma. Characterized by bronchoconstriction – shortness of breath, coughing, wheezing, chest tightness, and sputum production – asthma is triggered by many different stimuli, including cold or dry air, exercise or pollen, as well as airborne pollutants. The effects of bronchoconstriction can vary from short-term discomfort, such as an hour-long reaction with no lasting after-effects, to asthma attacks requiring medication or hospitalization. Although rare, death can result.

Sulfur dioxide induces bronchoconstriction in asthmatics, but only under certain conditions. To experience adverse effects from SO sub2 concentrations below 1.0 ppm, asthmatics must be exposed for five minutes or longer while breathing quickly and heavily through both nose and mouth, the sort of breathing induced by light exercise, shoveling snow, climbing several flights of stairs, or jogging to catch a bus. At concentrations above 2.0 ppm, SO sub2 causes adverse effects even if the exposure lasts less than five minutes or the asthmatic breathes regularly. *See* Second Addendum to Air Quality Criteria for Particulate Matter and Sulfur Oxides (1982): Assessment of Newly Available Health Effects Information (1986).

The Challenged Final Decision

This case concerns the effect on asthmatics of what are known as high-level SO sub2 bursts, defined as emissions of 0.50 ppm or more lasting at least five minutes. Occurring sporadically and from specific sources, SO sub2 bursts come primarily from power utilities; the rest come from nonutility sources such as industrial boilers, petroleum refineries, pulp and paper mills, sulfuric acid plants, and aluminum smelters.

Citing the health concerns of asthmatics and relying on a 1977 amendment to the Clean Air Act, in which Congress ordered the Agency to review and revise all criteria and NAAQS by 1980 and at five-year intervals thereafter, 42 U.S.C. § 7409(d), petitioners urged EPA to issue a new NAAQS limiting short-term SO sub2 bursts. Not until 1996, after petitioners sued twice to compel a decision, *see Environmental Defense Fund v. Thomas*, 870 F.2d 892 (2d Cir.1989); *American Lung Ass'n v. Browner*, Civil Action No. 92-5316 (E.D.N.Y. Nov. 12, 1992), and after two rounds of public notice and comment, did EPA issue its final decision regarding SO sub2 NAAQS. *See* NAAQS for Sulfur Oxides (Sulfur Dioxide) – Reproposal, 59 Fed.Reg. 58,958 (1994); Proposed Decision Not To Revise the National Ambient Air Quality Standards for Sulfur Oxides (Sulfur Dioxide), 53 Fed.Reg. 14,926 (1988). Rejecting petitioners' arguments, EPA concluded not only that the annual and 24-hour primary standards needed no revision, but also that an additional five-minute standard was unnecessary to protect asthmatics. *See* Final Decision at 25,575-76.

In arriving at her final decision, the Administrator reviewed a decade of data on the extent of high-level short-term SO sub2 bursts and their effects on public health. *See* Review of the National Ambient Air Quality Standards for Sulfur Oxides: Assessment of Scientific and Technical Information: Supplement to the 1986 OAQPS Staff Paper Addendum (Sept. 1994); Supplement to the Second Addendum (1986) to Air Quality Criteria for Particulate Matter and Sulfur Oxides (1982): Assessment of New Findings on Sulfur Dioxide Acute Exposure Health Effects in Asthmatic Individuals (Aug.1994). Based on clinical studies of mild to moderate asthmatics, she found that when such individuals breathe rapidly while exposed to SO sub2 concentrations of 0.60 ppm for five minutes, "substantial percentages (> = 25 percent)" experience effects "distinctly exceeding . . . [the] typical daily variation in lung function" that asthmatics routinely experience. Final Decision at 25,572. The severity of these atypical effects, she found, "is likely to be of sufficient concern to cause disruption of ongoing activities, use of bronchodilator medication, and/or possible seeking of medical attention." *Id.*

The scientific community disagreed about the medical significance of these effects and whether they should be considered "adverse." Some experts took the position that such symptoms usually have no lasting impact, amounting at worst to a brief period of reversible discomfort; others argued that even a one-hour disruption of activity can amount to a worrisome adverse health effect. The Administrator left this dispute unresolved. Instead, she discerned in the medical debate a consensus, which she adopted, that "repeated occurrences of such effects

should be regarded as significant from a public health standpoint." *Id.* at 25,573 (emphasis added).

The Administrator then discussed the three exposure analyses on which the 1994 version of the proposed rule rested. These studies estimated that from 180,000 to 395,000 "exposure events" – defined as a heavily breathing asthmatic exposed to an SO sub2 burst – occur annually, affecting from 68,000 to 166,000 asthmatic individuals. *Id.* at 25,574. In view of the Administrator's previous finding, reiterated by agency counsel at oral argument, that at least 25 percent of asthmatics experience atypical effects from exposure events, these data suggest that as many as 41,500 (> = 25 percent of 166,000) asthmatics experience atypical effects from repeated SO sub2 bursts each year. At the same time, the Administrator acknowledged that subsequent industry studies of four nonutility sources suggest that the 1994 studies may have overestimated exposure for certain SO sub2 sources, *id.*, meaning that the number of affected asthmatics could be lower. The Administrator did not resolve the conflict between the studies.

Armed with all these data, the Administrator concluded that "the likelihood that asthmatic individuals will be exposed . . . is very low when viewed from a national perspective," that "5-minute peak SO sub2 levels do not pose a broad public health problem when viewed from a national perspective," and that "short-term peak concentrations of SO sub2 do not constitute the type of ubiquitous public health problem for which establishing a NAAQS would be appropriate." *Id.* at 25,575. Describing SO sub2 bursts as "localized, infrequent and site-specific," she concluded that a new national standard was

unnecessary. *Id.* The Administrator nevertheless decided to encourage individual states to address short-term high-level SO sub2 emissions, initiating a rulemaking to provide appropriate guidance. Proposed Implementation Requirements for Reduction of Sulfur Oxide (Sulfur Dioxide) Emissions, 62 Fed.Reg. 210 (Jan. 2, 1997) ("Proposed State Guidelines Rulemaking") (soliciting public comment on proposed guidelines for state monitoring and regulation of five-minute peaks of SO sub2).

Petitioners now challenge the Administrator's decision declining to promulgate a new NAAQS. They assert that by failing to establish a five-minute NAAQS capping SO sub2 emissions at 0.60 ppm, EPA has violated its statutory responsibility to protect the public health. We review the Administrator's decision pursuant to 42 U.S.C. § 7607(d)(9)(A)-(C) ("[C]ourt may reverse any such [agency] action found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . [or] in excess of statutory . . . authority, or limitations. . . . ").

II

Petitioners challenge much of the data the Administrator relied on, as well as the conclusions she drew. Generally speaking, we will not second-guess EPA in its area of special expertise. *See Natural Resources Defense Council v. United States EPA*, 824 F.2d 1146, 1163 (D.C.Cir.1987) (en banc); *American Petroleum Institute*, 665 F.2d at 1184. Applying this deferential standard of review, we accept the Administrator's analysis of the exposure studies in the record, as well as the implication of her

analysis – that thousands of asthmatics can be expected to react atypically to SO sub2 bursts each year.

Petitioners contend that the Administrator's analysis amounts to a conclusive finding that SO sub2 bursts adversely affect asthmatics' health, thus triggering her duty to promulgate a new NAAQS. *See Lead Industries*, 647 F.2d at 1153. At oral argument, counsel for EPA vigorously disputed petitioners' contention that the Administrator "found" an adverse health effect. As we read the record, agency counsel appears to be correct: The Administrator did not decide whether asthmatic reaction to SO sub2 bursts – "disruption of ongoing activities, use of bronchodilator medication, and/or possible seeking of medical attention" – amounts to an adverse health effect or merely, as some medical experts argued, run-of-the-mill asthma symptoms indistinguishable from bronchodilation due to cold air or exercise. Final Decision at 25,572-73. Skipping this disputed question, the Administrator concluded that, regardless of the impact of single occurrences, "repeated occurrences of such effects should be regarded as significant from a public health standpoint." *Id.* at 25,573.

Disagreeing with this approach, petitioners argue that the Administrator had to answer the subsidiary "adverse effects" question, pointing to her warning to all states in the subsequent rulemaking that "[a]lthough these episodes are few, it is clear that 5-minute SO sub2 ambient concentration peaks pose a health threat to sensitive exposed populations," Proposed State Guidelines Rulemaking at 211. We need not decide that issue at this time, however, because we think the Administrator has failed to explain the answer she did give, *i.e.*, that SO

sub2 bursts do not amount to a "public health" problem within the meaning of the Act. The link between this conclusion and the factual record as interpreted by EPA – that "repeated" exposure is "significant" and that thousands of asthmatics are exposed more than once a year – is missing. Why is the fact that thousands of asthmatics can be expected to suffer atypical physical effects from repeated five-minute bursts of high-level sulfur dioxide not a public health problem? Why are from 180,000 to 395,000 annual "exposure events" (the range indicated by the 1994 studies) or some fewer number (as suggested by the industry studies) so "infrequent" as to warrant no regulatory action? Why are disruptions of ongoing activities, use of medication, and hospitalization not "adverse health effects" for asthmatics? Answers to these questions appear nowhere in the administrative record.

In her only statement resembling an explanation for her conclusion that peak SO sub2 bursts present no public health hazard, the Administrator characterizes the bursts as "localized, infrequent and site-specific." Final Decision at 25,575. But nothing in the Final Decision explains away the possibility that "localized," "site-specific" or even "infrequent" events might nevertheless create a public health problem, particularly since, in some sense, all pollution is local and site-specific, whether spewing from the tailpipes of millions of cars or a few offending smoke stacks. From the record, we know that at least six communities experience "repeated high 5-minute peaks greater than 0.60 ppm SO sub2," *id.*, and agency counsel told us at oral argument that these so-called "hot spots" are not the only places where repeated exposure occurs. Nowhere, however, does the Administrator

explain why these data amount to no more than a "local" problem.

Without answers to these questions, the Administrator cannot fulfill her responsibility under the Clean Air Act to establish NAAQS "requisite to protect the public health," 42 U.S.C. § 7409(b)(1), nor can we review her decision. Judicial deference to decisions of administrative agencies like EPA rests on the fundamental premise that agencies engage in reasoned decision-making. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 524-25, 544-45, 558, 98 S.Ct. 1197, 1202-03, 1211-13, 1219, 55 L.Ed.2d 460 (1978); *SEC v. Chenery Corp.*, 332 U.S. 194, 209, 67 S.Ct. 1575, 1583-84, 91 L.Ed. 1995 (1947) (agency's experience, appreciation of complexities and policies, and responsible treatment of the facts "justify the use of the administrative process"). With its delicate balance of thorough record scrutiny and deference to agency expertise, judicial review can occur only when agencies explain their decisions with precision, for "[i]t will not do for a court to be compelled to guess at the theory underlying the agency's action. . . ." *SEC v. Chenery Corp.*, 332 U.S. at 196-97, 67 S.Ct. at 1577. Where, as here, Congress has delegated to an administrative agency the critical task of assessing the public health and the power to make decisions of national import in which individuals' lives and welfare hang in the balance, that agency has the heaviest of obligations to explain and expose every step of its reasoning. For these compelling reasons, we have always required the Administrator to "cogently explain why [she] has exercised [her] discretion in a given manner." *Motor Vehicle Mfrs. Ass'n v. State Farm*

Mut. Auto. Ins., 463 U.S. 29, 48, 103 S.Ct. 2856, 2869, 77 L.Ed.2d 443 (1983).

In this case, the Administrator may well be within her authority to decide that 41,500 or some smaller number of exposed asthmatics do not amount to a public health problem warranting national protective regulation, or that three or six or twelve annual exposures present no cause for medical concern. But unless she describes the standard under which she has arrived at this conclusion, supported by a "[ ]plausible" explanation, *id.* at 43, 103 S.Ct. at 2866-67, we have no basis for exercising our responsibility to determine whether her decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . [or] in excess of statutory . . . authority, or limitations. . . . " 42 U.S.C. § 7607(d)(9)(A)-(C).

Given the gaps in the Final Decision's reasoning, we must remand this case to permit the Administrator to explain her conclusions more fully. We therefore need not resolve the debate between the parties over whether the Clean Air Act authorizes the Administrator to decline to protect an identifiable group of asthmatics from a known adverse health effect. Although our cases make clear that the Administrator has broad discretion to establish an "adequate margin of safety" above and beyond what scientific certainty prescribes and to craft regulations that protect against unknown harms, *see Lead Industries*, 647 F.2d at 1153-55 (Administrator must "err on the side of caution" when establishing the margin of safety, even where the "medical significance [of the effects] is a matter of disagreement"), they do not necessarily establish the converse proposition – that the Administrator may

decline to establish a margin of safety in the face of documented adverse health effects. Since in this case the Administrator has failed adequately to explain her conclusion that no public health threat exists, we can leave the issue of the scope of her authority for another day.

We remand this case to the agency for further proceedings consistent with this opinion.

So ordered.

Supreme Court, U.S.
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No. 98-1929

In the Supreme Court of the United States

AMERICAN LUNG ASSOCIATION, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly dismissed petitioners' request for attorneys' fees because petitioners did not achieve any success on the merits of their claims.

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OPINIONS BELOW

The order of the court of appeals denying petitioners' eligibility for an award of costs and attorneys' fees (Pet. App. 2-3) is unreported. The opinion of the court of appeals on the merits remanding the case to the Environmental Protection Agency (Pet. App. 4-17) is reported at 134 F.3d 388.

JURISDICTION

The order of the court of appeals denying petitioners' motion for costs and attorneys' fees was entered on December 31, 1998. A petition for rehearing was denied on March 3, 1999 (Pet. App. 1). The petition for a writ of certiorari was filed on June 1, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Section 307(f) of the Clean Air Act (CAA) provides that, in any proceeding for judicial review under the Act, a court "may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate" (42 U.S.C. 7607(f)). In the underlying suit in this matter, petitioners—the American Lung Association, two of its individual members, and the Environmental Defense Fund—sought review of the Environmental Protection Agency (EPA) decision under CAA Section 109(d)(1), 42 U.S.C. 7409(d)(1), not to revise the National Ambient Air Quality Standards (NAAQS) for sulfur dioxide (SO_2) to add a five-minute standard to protect against short-term, high-level SO_2 bursts. Pet. 2. CAA Section 109(d)(1) directs EPA to review and revise the NAAQS, "as may be appropriate," every five years (42 U.S.C. 7409(d)(1)). In conducting its review, EPA concluded that short-term peak SO_2 bursts, occurring sporadically and from specific sources, did not pose a broad public health problem warranting revision of the national standards. Pet. App. 5.

In challenging EPA's decision, petitioners asserted that "by failing to establish a five-minute NAAQS capping SO sub 2 emissions at 0.60 [parts per million], EPA has violated its statutory responsibility to protect the public health." Pet. App. 12. Petitioners also contended that the Administrator's analysis of the facts amounted to a conclusive finding that SO_2 bursts adversely affect asthmatics' health, thereby triggering her duty to promulgate a new NAAQS. *Id.* at 13. As relief, petitioners requested the court of appeals to vacate EPA's decision.

Noting that petitioners challenged much of the data the Administrator relied upon, as well as her conclusions based on those data, the court of appeals first stated that it would not "second-guess EPA in its area of special expertise." Pet. App. 12. Therefore, the court accepted EPA's "analysis of the exposure studies in the record, as well as the implication of her analysis." *Id.* at 12-13. Beyond that, the court did not reach the merits of petitioners' claims, finding instead that the Administrator had not adequately explained her decision, *ibid.*, and remanding the case to permit her "to explain her conclusions more fully." *Id.* at 16-17.

In doing so, the court of appeals stated that it "need not resolve the debate between the parties over whether the Clean Air Act authorizes the Administrator to decline to protect an identifiable group of asthmatics from a known adverse health effect." Pet. App. 16. The court went on to state that "the Administrator may well be within her authority to decide that 41,500 or some smaller number of exposed asthmatics do not amount to a public health problem warranting national protective regulation" (*ibid.*). See also *id.* at 15 (finding that without further explanation by the Administrator, the court could not review her decision); *id.* at 17 ("we can leave the issue of the scope of her authority for another day"). The court also determined that it need not decide the issue of whether the Administrator's analysis amounts to a conclusive finding that SO_2 bursts adversely affect asthmatics' health. *Id.* at 13.

Pursuant to a Settlement Agreement with EPA, petitioners did not seek rehearing on the merits of the decision. They did, however, move for attorneys' fees under CAA Section 307(f). EPA opposed the request for attorneys' fees on the basis that petitioners had not achieved a modicum of success on the merits of their

claims and that an award of fees was, accordingly, not appropriate. Finding that petitioners' request for fees is controlled by *Sierra Club* v. *EPA*, 769 F.2d 796 (D.C. Cir. 1985), the court of appeals denied the petition for attorneys' fees. The court determined that petitioners "did not meet with 'a modicum of success on the merits' because '[t]he agency may be able to justify its position with a simple response containing no reformation of the challenged portion of the rules.'" Pet. App. 3 (internal citation omitted).

ARGUMENT

Section 307(f) of the CAA authorizes an award of costs and attorneys' fees when the reviewing court "determines that such [an] award is appropriate." The court of appeals in this case determined that no such award was appropriate since petitioners did not "meet with 'a modicum of success on the merits.'" Pet. App. 3. In exercising the broad statutory discretion afforded it under Section 307(f), the court simply applied familiar legal principles to the specific facts in this case. The decision does not conflict with any decision of this Court or another court of appeals, and is not of sufficient importance to warrant review by this Court.

1. Petitioners emphasize that Section 307(f) was not intended to restrict the award of fees to situations in which the party seeking fees has prevailed. But, as this Court emphasized in *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 686 (1983), Section 307 "does not completely reject the traditional rule that a fee claimant must 'prevail' before it may recover attorneys' fees." Nothing in *Ruckelshaus*, or in any other case cited by petitioners, suggests that Section 307(f) was intended to require the court to award fees when it determines that the applicants' lack of success on the merits makes

such an award inappropriate. Indeed, *Ruckelshaus* and almost all the other cases cited by petitioners involved consideration of the quite different question whether an award that had been made was authorized by the statute.*

An award of attorneys' fees is typically considered "appropriate" if a plaintiff prevails on any significant issue in the litigation which achieves some of the benefit the parties sought in bringing suit. *Hensley* v. *Eckerhart*, 461 U.S. 424, 433 (1983). Although a fee award will be approved even if the party awarded the fee has not achieved a "major success" in the litigation, the party still must achieve "some success" on the merits of its claims for purposes of fee entitlement. *Ruckelshaus*, 463 U.S. at 688. In defining what constitutes the requisite level of success, this Court has explained that a party must prevail on some aspect of the merits of its claim in a way that "materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar* v. *Hobby*, 506 U.S. 103, 111-112

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* The sole exception is *Texas State Teachers Ass'n* v. *Garland Independent School District*, 489 U.S. 782 (1989). In that case, the district court recognized (*id.* at 787) that petitioners "had achieved 'partial success,'" but refused to award attorneys' fees in a civil rights case because in the Fifth Circuit "the test for prevailing party status is whether the plaintiff prevailed on *the central issue*" in the case. *Ibid.* This Court granted certiorari in *Garland* to resolve the conflict in the circuits on that test (*id.* at 784), and ultimately rejected the Fifth Circuit test. Nevertheless, in *Garland* the Court recognized that no fee award would be appropriate "where the plaintiff's success on a legal claim can be characterized as purely technical or *de minimis*," the finding the court made in denying fees in the instant case. *Id.* at 783.

(1992). See also *Texas State Teachers Ass'n* v. *Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989).

To make this determination, a court must "focus on the precise factual/legal condition that the fee claimant has sought to change, and then determine if the outcome confers an actual benefit or relief from a burden." *Grano* v. *Barry*, 783 F.2d 1104, 1108-1109 (D.C. Cir. 1986) (citation omitted). In some circumstances, a remand may qualify a petitioner as a prevailing party for the purpose of entitlement to attorneys' fees. *Shalala* v. *Schaefer*, 509 U.S. 292, 297-298 (1993). However, the petitioner still must demonstrate that it has succeeded on a significant issue in litigation which achieved some of the benefit sought in bringing the suit. *Id.* at 302.

2. In petitioners' view, the court of appeals' refusal to award attorneys' fees in this case imposes a "too stringent 'prevailing party' test for purposes of § 307(f)" and "would bar fees for a claim that would have satisfied traditional prevailing party tests." Pet. 13. This argument overlooks the crucial finding underpinning the court of appeals' denial of attorneys' fees—that the petitioners did not obtain the "modicum of success" on the merits (Pet. App. 3) that would make an award of attorneys' fees "appropriate."

a. While the court of appeals remanded the case to EPA to "permit the Administrator to explain her conclusions more fully," Pet. App. 16, it did not "grant[]" the petition for review as petitioners contend (Pet. 3). The court did not accept, or even resolve, petitioners' arguments on the merits. Instead, the court concluded that "[w]e therefore need not resolve the debate between the parties over whether the Clean Air Act authorizes the Administrator to decline to protect an identifiable group of asthmatics from a known adverse health effect." Pet App. 16. See also *id.* at 15 (stating

that the court could not review the Administrator's decisions without her answers to certain questions). Likewise, petitioners did not succeed in "winning" a decision that "rejected EPA's decision as not meeting the basic tests for reasoned decision-making." Pet. 12. The court of appeals did not find that EPA's decision was unreasonable, arbitrary, or capricious. Indeed, as the court explained, "[t]he agency may be able to justify its position with a simple response containing no reformation of the challenged portion of the rules." Pet. App. 3 (quoting *Sierra Club* v. *EPA*, 769 F.2d 796, 806 (D.C. Cir. 1985)). And while the case was remanded to "permit the Administrator to explain her conclusions more fully" (Pet. App. 16), she was not ordered to undertake a new rulemaking or required to "reconsider the public health consequences" (Pet. 17) of her decision as petitioners allege. Indeed, the sole basis for the court of appeals' remand decision was an argument not raised by petitioners—that the EPA Administrator had failed adequately to explain her actions.

Thus, notwithstanding petitioners' contrary characterization of the court of appeals' decision, petitioners have not obtained the "modicum of success" necessary for an award of attorneys' fees and costs. Nor can petitioners' effort to cast the remand as a "substantive" as opposed to "procedural" victory (Pet. 15-16) affect their entitlement to fees. At bottom, the court of appeals' decision does not provide petitioners with any of the benefit they sought in bringing the suit since EPA is not required to reconsider or modify the substance of its decision. And while the remand may provide petitioners another chance to persuade EPA that it was wrong and should revise the NAAQS to provide additional protections to asthmatics, this is the

same opportunity available to every member of the general public.

b. Petitioners assert that when courts review agency decisions not to act, there is no action to be vacated or reversed, and that the decision here begins to define a class of cases in which challenges to agency inaction "may win all there is to win, but still not qualify for an award of fees and costs." Pet. 6. While it is true that a remand may provide a petitioner all the relief that a court is authorized to provide in a particular situation, petitioners here did not "win" a remand that materially benefits them in any way based on any claim they raised. The remand was not premised on a review of the merits of petitioners' claims, a rejection of EPA's rationale, a finding that EPA's action was inconsistent with the Clean Air Act, or any deficiency in the factual evidence. EPA's decision not to revise the NAAQS stands. The Agency is under no obligation to initiate another rulemaking or even to reexamine its prior decision. EPA's only obligation is to provide a further explanation for the decision it did make. Thus, rather than defining a class of cases where fees are denied to parties who "win all there is to win," the court of appeals' decision here simply required these fee petitioners to meet their burden of demonstrating some success on the merits of their claims.

c. Petitioners suggest that they obtained "further relief" that entitles them to attorneys' fees based on a post-remand Settlement Agreement they negotiated with EPA (Pet. 4-5). Under the agreement, which was not filed in the court of appeals or any other court, EPA agreed to take final action on the remand no later than December 2000 and, in exchange, petitioners agreed not to seek rehearing or petition this Court for a writ of certiorari from the original decision. Although peti-

tioners argued to the court of appeals that the post-remand Settlement Agreement provided an alternative basis for fee entitlement, the court plainly did not agree since it denied the fee request. In any event, in cases where EPA has agreed or courts have directed EPA to pay plaintiffs' attorneys' fees for obtaining a schedule for agency action, the Agency has been under a statutory duty to meet a specific deadline. While EPA must complete the remand directed by the court, the court did not order the Agency to complete the remand within any particular time frame, and EPA agreed to a deadline only because petitioners agreed in return that they would not press further appeals of the court's decision.

3. The court of appeals' denial of fees is fully consistent with CAA Section 307(f) and applicable precedents of this Court. While Section 307(f) expanded the class of parties eligible for fee awards, it did not eliminate the requirement that a petitioner must be at least "partially prevailing," achieving "some success" on the merits. *Ruckelshaus* v. *Sierra Club*, 463 U.S. at 688. See also *Texas State Teachers Ass'n* v. *Garland Indep. Sch. Dist.*, 489 U.S. at 791-792 (to be prevailing, a party must succeed on "any significant issue in litigation which achieve[d] some of the benefit * * * sought in bringing suit"). Because petitioners failed to meet this standard, the court of appeals' denial of fees does not undermine congressional intent in enacting Section 307(f).

Nor does *Shalala* v. *Schaefer*, 509 U.S. 292 (1993), authorize attorneys' fees whenever a party obtains a remand, as petitioners contend (Pet. 10). The Court's decision in *Shalala* rested on the distinction between two types of remands available under the Social Security Act—a sentence four remand, which termi-

nates the litigation in a judgment for the plaintiff by reversing the Secretary's denial of benefits, and a sentence six remand, which does not. 509 U.S. at 297-298, 302. As the Court found, a sentence four judgment reversing the Secretary's denial of benefits "certainly meets" the prevailing party requirement that the plaintiff "has succeeded on any significant issue in litigation which achieve[d] some of the benefit . . . sought in bringing suit." *Ibid.* (quoting *Texas State Teachers Ass'n* v. *Garland Indep. Sch. Dist.*, 489 U.S. at 791-792).

Because the remand here did not provide any benefit to petitioners or change the legal relationship between EPA and petitioners, the denial of fees in this case is not "at odds with" the result in *Shalala*. Pet. 11. EPA's decision not to revise the SO_2 NAAQS was not vacated. The Agency is not under any obligation to promulgate a new, more stringent SO_2 standard; nor is it required to reconsider its decision not to revise the NAAQS. Moreover, the fact that the remand terminated the litigation, with the court of appeals no longer retaining jurisdiction over the case, does not automatically mean it constitutes a victory for petitioners. The Court's award of fees in *Shalala* was premised not only on the fact that the sentence four order terminated the case with the entry of a final judgment, but also on the ground that it did so in a manner favorable for the plaintiff, reversing the Secretary's denial of benefits. 509 U.S. at 301-302. As a result, the court of appeals' reliance on *Sierra Club* v. *EPA*, 769 F.2d 796 (D.C. Cir. 1985), does not constitute error. That case, consistently with *Ruckelshaus* and *Shalala*, merely requires that a petitioner seeking fees under Section 307(f) must demonstrate at least some success on the merits—a

burden petitioners cannot meet here. See *Sierra Club*, 769 F.2d at 800.

4. The court of appeals' decision denying fees presents no conflict with decisions in other circuits. In the cases cited by petitioners (Pet. 19-22), attorneys' fees were awarded for petitioners' efforts in achieving a remand of agency action. In each of those cases, however, the court reached the merits of petitioners' claims, finding that the agency action was arbitrary or capricious or not consistent with the governing statute. The marked distinction here is that the D.C. Circuit did not reach the merits of any of petitioners' claims—a fact petitioners themselves admit (Pet. 23)—finding that without further explanation, the court could not "review [the Administrator's] decision." Pet. App. 15.

5. Far from opening a "Pandora's box" requiring the court of appeals to speculate concerning the likely outcome of agency proceedings on remand (Pet. 23-24), the court's decision demonstrates a precise focus on the nature of the petitioners' claims, what they sought to achieve in the litigation, and whether the result obtained advanced those goals. Because petitioners did not meet with a "modicum of success" on the merits of their litigation, the court properly found attorneys' fees were not "appropriate." And even if EPA, in conducting proceedings on remand, is confronted with the hurdles that petitioners allege preclude the Agency from "simply re-adopting its initial position" (Pet. 23), these are not hurdles imposed by the court but only hurdles an agency addresses to meet its obligation to conduct reasoned decisionmaking.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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On Petition For A Writ Of Certiorari
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AMERICAN LUNG ASSOCIATION'S REPLY TO ENVIRONMENTAL PROTECTION AGENCY'S OPPOSITION TO CERTIORARI

1. EPA's Decision Was Remanded Because It Is Arbitrary and Capricious.

Petitioners have demonstrated that the denial of costs and attorneys' fees in *ALA v. EPA* "because 'the agency may be able to justify its position with a simple response containing no reformation of the challenged portion of the rules' ", Pet. App. 3, is in conflict with the *Ruckelshaus* and *Shalala* decisions of this Court and the decisions of four courts of appeals granting fees in cases where agency decisions were remanded on grounds that would allow the agency to re-adopt the challenged portion of the rules. While the government necessarily acknowledges that the *ALA* Court found "the Administrator had not adequately explained her decision, and remand[ed] the case to permit her 'to explain her conclusions more fully'," Opp. at 3, EPA attempts to avoid the conflicts with these cases by arguing that the decision below did not expressly "find that EPA's decision was unreasonable, arbitrary, or capricious." Opp. at 7. EPA argues that since the Court did not expressly declare EPA's decision to be arbitrary and capricious, then this Court should reject the petition because ALA won nothing of substance and cannot be eligible for an award of costs and fees.

The government's argument is nothing more than a red herring, placing form over substance, because it ignores the fundamental tenet of administrative law that whenever "the agency has failed to offer the rational connection between facts and judgment," its decision fails to "pass muster under the arbitrary and capricious standard." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 56 (1983). The Court of Appeals unquestionably remanded EPA's decision because the Agency failed to explain why "SO2 bursts do not amount to a 'public health' problem within the meaning of the Act," and neglected its "heaviest of obligations to explain

and expose every step of its reasoning." *ALA v. EPA*, 134 F.3d at 392 [Pet. App. 15]. Identifying fundamental contradictions between the factual evidence of harm to the health of asthmatics and EPA's conclusion that these effects are not a public health problem, Pet. App. 14, the Court concluded "[w]ithout answers to these questions, the Administrator cannot fulfill her responsibility under the Clean Air Act to establish NAAQS 'requisite to protect the public health'." Citing *Motor Vehicle Manufacturers*, the Court reiterated "we have always required the Administrator to 'cogently explain why [she] has exercised [her] discretion in a given manner.' " Pet. App. 15. "Given the gaps in the Final Decision's reasoning, we must remand this case to permit the Administrator to explain her conclusions more fully." Pet. App. 16.

Ultimately, the Court did not decide the central legal issue presented by ALA – that EPA may not lawfully decline to protect asthmatics from known adverse health effects caused by exposure to ambient concentrations of SO2 – but not because the Court found any fault with petitioners' argument. The Court explained that it would defer the central legal issue ALA raised "[s]ince in this case the Administrator has failed adequately to explain her conclusion that no public health threat exists, we can leave the issue of the scope of her authority for another day." Pet. App. 17. The Court nonetheless went out of its way to remind the Agency that "although our cases make clear that the Administrator has broad discretion to establish an 'adequate margin of safety' above and beyond what scientific certainty prescribes . . . , they do not necessarily establish the converse proposition – that the Administrator may decline to establish a margin of safety in the face of documented adverse health effects." Pet. App. 16-17.

At no point did the Court reject ALA's central legal arguments. The Court did, however, find EPA's decision to be fundamentally flawed because it failed to satisfy one of the most basic tests of reasoned decisionmaking – the obligation to "articulate a satisfactory explanation for

its action including a 'rational connection between the facts found and the choice made.' " *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. at 43, citing *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962).

EPA cannot avoid the arbitrary and capricious nature of its decision or the significance of a court order remanding that decision simply because the *ALA* Court did not expressly declare EPA's decision to be arbitrary and capricious. Certainly, a consistent line of prior decisions by this Court and the D.C. Circuit leaves no doubt that the basis for remand in this case – the Administrator's failure to adequately explain her decision – is arbitrary and capricious without the Court having to use these magic words in every case.

This Court has recently reaffirmed that the Administrative Procedure Act's scheme for "reasoned decisionmaking" requires "[n]ot only [that] an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational. Courts enforce this principle with regularity when they set aside agency regulations which, though well within the agencies' scope of authority, are not supported by the reasons that the agencies adduce." *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998). The decisionmaking scheme enacted for setting NAAQS under the Clean Air Act is no different. It too allows a court to reverse "any action of the Administrator . . . found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(9).

Similarly, the D.C. Circuit has frequently held that an agency's failure to adequately explain its decision is arbitrary and capricious. " 'The requirement that agency action not be arbitrary and capricious includes a requirement that the agency adequately explain its result.' *Public Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C.Cir. 1993); *Federal Election Comm'n v. Rose*, 806 F.2d 1081, 1088 (D.C. Cir. 1986)." *Dickson v. Secretary of Defense*, 68 F.3d 1396

(D.C.Cir. 1995). Thus it is clear that the *ALA* court's remand of EPA's decision not to revise the NAAQS is based on a deficiency in agency decisionmaking that is arbitrary and capricious. This deficiency is not a minor flaw of little consequence.

2. Litigation Winning Remand of Arbitrary and Capricious Decision Achieves "Some Success"

The fundamental issue in this case is whether it is appropriate to deny costs and fees in cases where the agency decision is remanded because it fails the duty to adequately explain the result (or any other test of arbitrary and capricious decisionmaking), but can theoretically be remedied by the agency on remand without necessarily changing the result.

The Court of Appeals denied ALA's motion for a determination of eligibility for an award of costs and fees on the ground that petitioners had not achieved " 'a modicum of success of the merits' because '[t]he agency may be able to justify its position with a simple response containing no reformulation of the challenged portion of the rules.' " Pet. App. 2-3. The implication of this decision is that winning a remand of an arbitrary and capricious agency action, no matter how serious the error by the agency as long as it is not an error of law that prohibits the agency from re-adopting its initial result on remand, may not satisfy the modicum of success test for determining that fees and costs are appropriate.

The remand of most arbitrary and capricious decisions – such as failure to explain, failure to provide adequate notice in the proposal of the final outcome, failure to consider relevant factors, failure to respond to significant comments, failure to consider all relevant aspects of the problem – almost always allow the agency to re-adopt the remanded position once the error in decisionmaking is remedied. The necessary implication of the position argued by the government, and adopted by the Court below, is that such decisions be treated as not

satisfying this Court's "some success" test in *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983), for determining when fees are "appropriate" under § 307(f), or as mere procedural victories. But such a result is clearly at odds with the rationale underlying the decision in *Ruckelshaus*.

This Court concluded that Congress chose the phrase "whenever . . . appropriate" to "expand the class of parties eligible for fee awards from prevailing parties to partially prevailing parties – parties achieving some success, even if not major success. Put differently, by enacting § 307(f), Congress intended to eliminate both the restrictive readings of 'prevailing party' adopted in some of the cases cited above and the necessity for case-by-case scrutiny by federal courts into whether plaintiffs prevailed 'essentially' on 'central issues'." *Id.*, 688.

This Court's decision rested in part on an analysis of the decision in *NRDC v. EPA*, 484 F.2d 1331 (1st Cir. 1973) cited by the House committee in its 1977 report explaining the basis for the language that became § 307(f). In *NRDC*, the court of appeals granted fees for success on claims challenging EPA's approval under the Clean Air Act of state implementation plans that included, *inter alia*, a claim challenging EPA's determination that the State has "adequate personnel, funding and authority to carry out [its] implementation plan." *NRDC v. EPA*, 478 F.2d 875, 890-891 (1st Cir. 1973). In response to that claim, the court determined it lacked the information needed to determine whether the Administrator had made "a reasoned judgment," and "direct[ed] the Administrator to provide us with a detailed statement of his rationale for concluding . . . that Massachusetts . . . will have adequate personnel, funding and authority. . . . " *Id.*, 891. In all relevant respects, the First Circuit's decision on that claim is similar to the *ALA* court's remand for further explanation by the Administrator at issue here.

But unlike the decision here, the First Circuit granted fees for this claim as well as other claims in that case. That outcome is particularly relevant here because the House committee relied upon the First Circuit decision to

explain that it "did not intend that the court's discretion to award fees should be restricted to cases in which the party seeking fees was the 'prevailing party.' In fact, such an amendment was expressly rejected by the committee, largely on the grounds set forth in NRDC v. EPA, 484 F.2d 1331, 1388 [sic] (1st Cir.1973)." H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 337 (1977). This Court, in turn, relied upon the *NRDC* decision to assess the intent of Congress, and to conclude "that adoption of the 'when appropriate' standard was intended to permit awards of fees to all partially prevailing parties. After all, this was just what the facts were in NRDC v. EPA." *Ruckelshaus* at 691. Since the First Circuit's decision awarding fees for a remand to EPA for further explanation in *NRDC* was included in what Congress intended be treated as "appropriate" for an award of fees when it enacted § 307(f), and was included within what this Court understood to be a "partially prevailing" party in *Ruckelshaus*, then the decision below denying fees for similar relief is clearly in conflict with the case law of this Court.

Resolving this conflict is essential if the fee-shifting provision of § 307(f) is to achieve Congress's purpose "to encourage litigation which will assure proper implementation and administration of the act or otherwise serve the public interest." H.R. Rep., 337. Proper implementation and administration of the Act clearly requires decisions that are adequately explained and not arbitrary and capricious. To the extent Congress has provided for the reversal of arbitrary and capricious decisions in § 307(d)(9), it has expressed an intent that decisions that are arbitrary and capricious because they are not supported by a rational connection between the facts found and the action taken should not be affirmed. ALA's success in winning a remand of EPA's decision on this ground must necessarily serve the proper implementation and administration of the Act. A decision that serves the proper implementation and administration of the Act, must also have achieved "some success" and therefore be eligible for an award under § 307(f).

3. Denying Fees For Remand of an Arbitrary and Capricious Decision Creates a Conflict With Decisions of Four Courts of Appeals.

The denial of costs and fees in this case also creates a conflict with the decisions of the four courts of appeals that have authorized fees under the "whenever . . . appropriate" test in cases where agency action has been remanded on arbitrary and capricious grounds (*see* Pet. 19-22) precisely because the EPA decision remanded in *ALA* could not pass muster under the arbitrary and capricious standard. The remand in *ALA* is indistinguishable from these Fourth, Fifth, Ninth and District of Columbia circuit decisions where fees were awarded after agency decisions were remanded because they failed similar or other tests of arbitrary and capricious decisionmaking. These conflicts need to be resolved by this Court.

4. ALA Also Satisfies "Prevailing Party" Tests.

Although this Court has made clear under the CAA that the measure of success sufficient to satisfy the threshold requirement for an award of fees under § 307(f) need not achieve the degree of success required to satisfy the "prevailing party" test, ALA also has achieved success sufficient to satisfy this Court's criteria for a prevailing party. In *Texas State Teachers Assn. v. Garland Independent School District*, 489 U.S. 782, 791-792 (1989) and *Shalala v. Schaefer*, 509 U.S. 292, 301 (1994), the Court concluded prevailing party "status [is] obtained 'if the plaintiff has succeeded on any significant issue in litigation which achieve[d] some of the benefit . . . sought in bringing suit.' "

EPA argues that this prevailing party test[1] has not been satisfied because "[a]t bottom, the court of appeals'

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[1] EPA offers no authority for the contention implied by its reliance on cases construing prevailing party statutes, i.e., the Civil Rights Act, 42 U.S.C. § 1988 and the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(B), that such cases prescribing

decision does not provide petitioners with any of the benefit they sought in bringing suit since EPA is not required to reconsider or modify the substance of its decision." Opp. at 7. Assuming, *arguendo*, that prevailing party tests might be relevant to satisfying the less restrictive "whenever appropriate" test in § 307(f), clearly ALA has achieved results that include some of the relief sought in bringing suit.

First, the relief obtained from the litigation includes both the remand ordered by the Court and the post-decision commitment by EPA to conduct a rulemaking on remand and to make a final decision no later than December 2000. In a Settlement Agreement between petitioners and EPA, that was finalized following publication by EPA of notice announcing the terms of the Agreement and inviting comment pursuant to § 113(g) of the CAA, 42 U.S.C. § 7413(g), EPA agreed "to undertake a remand proceeding in accordance with the time lines for action on the remand and for solicitation of comment set forth in [the Federal Register Notice published at 63 Fed. Reg. 24,782-784]." The Notice announced EPA's agreement that "EPA will propose its response to the SO2 NAAQS remand for public comment in the summer of 1999 and take final action no later than December 2000." *Id.*, 24,783/1.

Under the precedent of this Court, the relief obtained directly from EPA in lieu of further litigation to compel a rulemaking under judicially prescribed deadlines is relevant to determining whether ALA is a prevailing party. "The fact that respondent prevailed through a settlement rather than through litigation does not weaken her claim to fees." *Maher v. Gagne*, 448 U.S. 122, 129 (1980). The Court even noted that the legislative history of § 1988, a

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prevailing party tests are relevant to a fee claim under the less restrictive "whenever appropriate" test of the CAA.

prevailing party statute, "expressly stated that 'for purposes of the award of counsel fees, parties may be considered to have prevailed . . . without formally obtaining relief.' " *Id.*

The total package of relief, including the judicial remand which requires further action by the Administrator to remedy her failure to adequately explain her decision, and the Settlement Agreement which defines that action to include a new rulemaking by a date certain, obtained a significant portion of the relief ALA sought. If ALA had won all the relief it sought, it would have won a remand as part of a decision declaring unlawful EPA's failure to extend the protection of air quality standards for sulfur oxides to prevent its adverse effects on asthmatics' health. ALA nonetheless achieved a major portion of its purpose for bringing suit by winning a remand with instructions for the Administrator to resolve the fundamental conflict between her findings that "repeated occurrences of exposure to such effects should be regarded as significant from a public health standpoint," Pet. App. 10, and "it is clear that 5-minute SO2 ambient concentration peaks pose a health threat to sensitive exposed populations," *id.*, with her final decision "that a new national standard was unnecessary." Pet. App. 8-9. That remand clearly provided the necessary predicate for EPA's commitment to conduct a new rulemaking, which EPA would never have agreed to if its decision had been affirmed by the Court and become settled Agency precedent. Equally important, ALA suffered no loss with regard to any of its legal claims that the Court deferred to another day.

As a result of this litigation, EPA is now required to reconsider its decision in a new rulemaking with instructions to resolve the conflict between the evidence EPA found of health effects to asthmatics caused by SO2 bursts and the statutory obligation to protect public health with an adequate margin of safety. This, indeed, changes the legal relationship between ALA and EPA, and accomplishes more than simply giving ALA another

chance to persuade that protection for asthmatics is required. It also requires EPA to remedy an arbitrary and capricious decision that failed to provide a rational connection between the facts found and the action taken. This result satisfies the traditional tests for establishing prevailing party status, and *a fortiori*, is a result that satisfies the less restrictive test for an award of fees and costs under § 307(f).

CONCLUSION

The conflicts between the denial of fees and costs in this case and the decisions of this Court governing eligibility for fees under § 307(f) as well as eligibility for fees under prevailing party statutes, and the conflicts with decisions granting fees in similar remand situations in four circuits should be resolved by this Court to ensure the effective implementation and administration of the environmental statutes of the Nation.

Respectfully submitted,

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